No. 11-5315

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Daniel Choi,

Petitioner

ON PETITION FOR A WRIT OF MANDAMUS/PROHIBITION TO THE HONORABLE ROYCE C. LAMBERTH

(Criminal Case No. 10-729-11, The Honorable John M. Facciola, Presiding)

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS/PROHIBITION OF DANIEL CHOI

DANIEL CHOI
Pro Se
271 W 47th St. #40D
New York, NY 10036
(714) 654-0828
contact@ltdanchoi.com

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REPLY

Lt. Daniel Choi replies to the Government's Opposition filed December 19, 2011.

SELECTIVE PROSECUTION

Government repeatedly claims in its Opposition Brief (Opp.) that a selective prosecution or vindictive prosecution claim is 1) meritless and 2) too expensive to counter. Both Government claims are specious. As in Yick Wo v. Hopkins 118 U.S. 356 (1886), and four other cases affirming selective prosecution claims, the universe of similarly situated is also clearly observed here.[1] Government clearly understood and stipulated the universe of similarly situated, in its memorandum motion in limine:

> The defendant's selective-prosecution claim, as alluded to in his August 24, 2010, telephone conversation with government counsel, the pretrial status conference on August 25, 2010, and the Motion to Compel ... claim 'that other protestors on the White House sidewalk, similarly situated, have been disparately treated' ... that other protestors who have handcuffed themselves to the White House fence have been disparately treated (Mot. 25-26).

Articulated by Lt. Choi on the witness stand, selection was based not on race but an arbitrary classification: the exercise of a protected constitutional activity.

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[1] United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (finding prosecution of draft resistance leader suspect because a number of high-ranking Department of Justice officials reviewed and approved the decision to bring charges); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (finding selective prosecution of a Vietnam War protestor suspect for lack of prosecution of 16 other government sanctioned individuals who demonstrated the same disruptive effect as the defendant's); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (finding enforcement policy targeting vocal census-resisters inherently suspect); United States v. Robinson, 311 F.Supp. 1063 (W.D. Mo. 1969) (finding disparate treatment of government and private wiretapping, and systematic discrimination of political organizations who were targets of the surveillance).

Indeed, Yick Wo was not decided purely for racial considerations, but fundamental non-traditional property (economic) interests: laundry businesses in wooden structures. Here, the fundamental liberty interest of the First Amendment creates an analogous situation.[2]

The universe of similarly situated: persons affixing themselves to the White House Fence, constitute a small number. Researching this universe of similarly situated cost $0.08 on PACER. TAB A provides a possible universe of similarly situated. None of the similarly situated were prosecuted federally.

Further research using "*Google.com*" resulted in additional dissimilarly situated protestors, including several who were litigated by Assistant US Attorneys Angela S. George, Esq., or Stratton C. Strand, Esq. In one instance, demonstrators (not affixed to the White House Fence) were charged with permit violations.[3] In the most recent instance, charges were dropped against dancers in a national park.[4]

Government's comparison of the instant case with US v Sheehan is therefore erroneous. Sheehan was not similarly situated because she did not affix herself to the

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[2] Government argues that "Shuttlesworth is not a selective-prosecution case" because it was decided on First Amendment grounds. However, selective prosecution may be based on free speech or other constitutionally protected activity. "The decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, including the exercise of protected statutory and constitutional rights" Wayte v. United States, 470 U.S. 598, 608 (1985). Shuttlesworth was indeed a landmark selective prosecution case where exactly this occurred, resulting in the chilling of free speech for certain classifications of persons. Judge Facciola raised the case in this context on March 18, 2011.

[3] United States v. Sheehan, 512 F.3d 621 (D.C. Cir. 2008).

[4] United States v. Kokesh, et al. Charges dropped September 22, 2011.

fence; she was charged with permit violations (36 C.F.R. 7.96). On March 18, 2011, Angela George declared permit regulations are not applicable to the instant case, which is "uniquely situated" (Tr. 3/18/2011 at 23).

> This case is uniquely situated. It does not constitute a no permit charge because the Defendants stood on the masonry base, which is in between the base of the White House fence and the sidewalk. So under the -- 36 C.F.R. 7.96, they aren't in violation of the no permit rule, so we could not charge them with no permit (Tr. 3/18/2011 at 23).

As Ms. George has personally prosecuted many of the cases in question, any argument alleging financial burden must consider these files are in the "peculiar knowledge and possession" of Ms. George, Mr. Strand, Mr. McLeese and Mr. Machen themselves.

VINDICTIVE PROSECUTION

A review of the universe of similarly situated will show in fact, no demonstrator affixed to the White House Fence was federally charged except the 13 "Don't Ask Don't Tell" protestors in November 2010. Considering the history of Lt. Choi's wrongful arrests, *vindictive* prosecution is readily obvious. After successfully asserting constitutional rights and pleading not guilty in two prior municipal prosecutions, the government vindictively conspired to elevate charges for no valid governmental interest. Even the Park Police exhibited vindictive behavior, particularly Det. Sgt. Timothy Hodge, who used excessive force to arrest Lt. Choi, a peaceful non-violent protestor.

The political ramifications influencing the government vindictiveness were however, exceptional in this circumstance. Wiring plea deals for the 13 arrestees was an

attempt to coerce Lt. Choi into pleading guilty, as he was the main target of the prosecution and the Obama Administration. Politically, the message to the gay rights movement would be unequivocal: "***protest does not affect political change and has no place in our society.***" The chilling of First Amendment protections would extend far beyond the confines of the gay rights movement: Libertarians dancing at Thomas Jefferson Memorial, Christians distributing Gospel tracts, pro-life activists, environmental conservationists and any other community peaceably assembling, petitioning for redress of grievances are harmed by such a prosecutorial policy.

The continued legal maneuvers by the prosecution, including petition for unlawful mandamus and unnecessary delays, indeed perpetuate prosecutorial vindictiveness to the present day, 130 days since trial commencement.

FRCrP 12(b)(3) PRE-TRIAL MOTIONS

Government incorrectly claims selective and vindictive prosecution must be raised pre-trial. Neither FRCrP 12(b)(3) nor FRCrP 47 state selective or vindictive prosecution. Throughout the entire Federal Rules, no mention of either "selective prosecution" or "vindictive prosecution" exists. All authorities indicate the defense may be raised at trial, regardless of "good cause" for not raising it pretrial. FRCrP 12.1 (Alibi Defense), 12.2 (Insanity Defense), 12.3 (Public Authority Defense) are specifically listed as such defenses that must be raised pretrial. *Expressio unius est exclusio alterius* guides statutory construction and interpretation here. If it is not a listed motion in the statute, it is excluded from the required pretrial raising requirement.

Still, Lt. Choi ***did*** *raise the claim pretrial*. Respondent and Petitioner (and Trial Judge) unequivocally agree on this point.

> By the same token, you could have at that point [the August 25, 2011 final pretrial conference] asked me, because ***selective prosecution was raised***, to continue the proceeding so that issue could be addressed. But we all went forward. (Tr. 8/31/11 PM at 10) (emphasis added).

Moreover, Lt. Choi's August 25 oral raising of selective prosecution in pretrial conference (Tr. 8/25/2011) constituted a motion, as Judge Facciola has discretion to determine what constitutes a proper motion. FRCrP 47. Finally, the government argument that selective prosecution must be raised pretrial is negated by the very caselaw it presents:

> The Trial court permitted discovery after the defendant introduced evidence suggesting a link ... The trial court directed the government to supply appellant with information ... The government produced most of the statistical information requested by the trial court, and following three days of testimony on this question, the trial court ultimately determined that appellant had not proved her claim of selective prosecution.

United States v. Washington, 705 F.2d 489, 494-495 (D.C. Cir. 1983).

Applying the *in pari materia* canon of statutory construction, if the selective or vindictive prosecution defenses were included or interpreted to be read into the Federal Rules, they should belong in FRCrP 12(b)(2): motions that ***may*** be raised ***either pretrial or at trial***. Rule 12(b)(2) specifically concerns defenses and not motions, which are found in 12(b)(3). "Selective Prosecution" is a ***defense*** not a mere ***motion***: defenses require

multiple motions over a period of time, to include discovery motions, motions to compel, motions to dismiss, etc.

Additionally, a selective prosecution defense is profoundly factual: who did what to whom and why.

> [D]efenses, such as self-defense, insanity, entrapment, [that] require factual determinations that the [trier of fact] should make, render[] pretrial disposition inappropriate ... In these cases, the question is not whether the defense *must* be raised prior to trial, but whether it *may* be raised prior to trial.

United States v. Smith, 866 F.2d 1092, 1097 fn 5 (9th Cir. 1989) (emphasis original).

Finally, that a defendant may raise the selective or vindictive prosecution defense either pretrial or at trial is more consistent with the unusually high burden of proof for discovery that is imposed upon a defendant making such a claim. A defendant "must first make a preliminary or threshold showing of the essential elements of the selective-prosecution defense." United States v. Jacob, 781 F.2d 643, 646 (8th Cir. 1986). "[E]ven to initiate discovery to prove impermissible motives a defendant must make a colorable showing [of selective or vindictive prosecution]." Washington at 493. "[A] mere allegation of selective prosecution ... does not require the government to disclose the contents of its files." United States v. Catlett, 584 F.2d 864, 865 (8th Cir. 1978). "[T]he defendant must produce some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." Ibid. An evidentiary hearing on the issue will

only be granted if the "defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive." Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993).

Evidence, not timing, triggers the prima facie finding. In some cases, the defense can be raised even after trial. United States v. Jones, 52 F.3d 924, 925 (11th Cir. 1995). A rule requiring pretrial motion for the defense, or else waiver of the claim forever, is imprudent. When evidence emerges only at trial, as occurred in the instant case, defendants should not be punished for a prosecutor's unlawful concealment of such evidence. This curtails their Sixth Amendment right to present a complete defense.

TRIAL JUDGE DISCRETION

Legislative intent on judicial discretion is clear. FRCrP 12 "leaves with the court discretion to determine in advance of trial defenses and objection raised by motion or to defer them for determination at the trial." Notes of Advisory Committee on Rules, 1944, Note to Subdivision (b)(4); see also, Notes of Advisory Committee on Rules, House Report No. 94-247; 1975 Amendment: "Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after judgment."

Complying with the proper decision of the trial judge to set final deadline of closing argument for any selective prosecution claims, Defense Counsel Kent raised motion at trial:

> But during the course of the trial and the direct testimony of certain witnesses, evidence has been elicited that suggests, in fact, the government may have a case where selective

> prosecution can be made by the defense (Tr. 8/31/2011 at 3-8).

Any defendant motion to dismiss on selective prosecution grounds would be impossible due to lack of required discovery. Judge Facciola found prima facie for selective and vindictive prosecution.

DOUBLE JEOPARDY

Government violated double jeopardy by seeking Judge Lamberth's hearing and mandamus. A criminal trial may not be stopped due to unfavorable findings and brought before a different judge of the same court (who was not present during any part of the original trial) for reversal or remedy. Due process enshrined in the Fifth Amendment protects "a defendant's valued rights to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 690 (1949). The double jeopardy "prohibition is not against being twice punished, but against being twice put in jeopardy." United States v. Ball, 163 U.S. 662, 669 (1896).

> Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when double jeopardy attaches. [Any doubt is resolved] in favor of the liberty of the citizen, rather than exercise that would be an unlimited, uncertain, and arbitrary judicial discretion.

Downum v. United States, 372 U.S. 734, 736-38 (1963) (double jeopardy violated when second jury empaneled). The

> State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as

> enhancing the possibility that, even though innocent, he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken[.]

Abney v. United States, 431 U.S. 651, 662 (1977).

JUDICIAL USURPATION

"Judges are presumed to know and apply the law correctly" United States v. Ayers, 428 F.3d 312, 315 (D.C. Cir. 2005), but this does not apply to the judicial usurpation that occurred in the instant case. By hearing and granting mandamus mid-trial, Judge Lamberth usurped Judge Facciola's exclusive first jurisdiction to try the case to judgment. 18 U.S.C. § 3401.[5] Judge Lamberth tried Lt. Choi a second time for the same offense. Lt. Choi now has the indisputable right to remedy for the violation.

The only adequate remedy is mandamus by this Court. Government opposes Lt. Choi's interlocutory appeal, No. 11-3094, asserting Lt. Choi does not have absolute right to that alternative method. Choi asserts he does indeed have the interlocutory appeal, although it is not an *adequate* remedy.

Judge Lamberth interdicted mid-trial, thus removing himself from the normal course of appeal. In a normal course of appeal he would be curiously reviewing himself.

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[5] "When specially designated to exercise such jurisdiction by the district court or courts he serves, any Untied States magistrate judge shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district." 18 U.S.C. § 3401

A judge's post-judgment review of his own judgment is not an "appeal" as Government claims. It would be a "reconsideration." Appeals require a different judge's review.

The delay for interlocutory appeal also makes it inadequate; today marks the 130th day since trial commenced, and the 416th day since the wrongful arrest.Further delay violates Lt. Choi's Sixth Amendment right to trial without undue delay. Cf. FRCrP 48(b)(3).

CRIMINAL MANDAMUS DOES NOT EXIST FOR GOVERNMENT

Unlike Civil Procedure i.e., FRCP 81(b), the rules for Criminal Procedure do not have a rule specifically abolishing mandamus at the District Court. They did not need such abolition, because mandamus in criminal cases never existed.[6] Government alludes to the rule that review before judgment in criminal cases is not normally permitted. "In criminal cases [the] interruption of trial exacts a presumptively prohibitive price[.]" Flanagan v. United States, 465 U.S. 259, 269 (1984).

> As the Sixth Amendment's guarantee of a speedy trial indicates, the accused may have a strong interest in speedy resolution of the charges against him. In addition, 'there is a societal interest in providing a speedy trial which exists separate from... the interests of the accused.' Barker v. Wingo, 407 U.S. 514, 407 U.S. 519 (1972). As time passes... evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote. Prompt acquittal of a person wrongly accused... is as important as prompt conviction and sentence of a person rightly accused.

Id. at 264-265.

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[6] This Court's decision in In re Cheney, 406 UF.3d 723, 729 (D.C. Cir. 2005) (en banc), formally abolished District Court Mandamus with respect to criminal cases.

> The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment...This insistence on finality and prohibition of piecemeal review discourages undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.

DiBella v. United States, 369 U.S. 121, 124 (1962).

The Framers of the Constitution knew that no criminal trial would ever be prompt with mandamus, as either side could use it as a delay tactic, as the government has demonstrated in this case.[7] The unnecessary delay has significantly improved prosecutorial advantage at trial, allowing witnesses to consult each other, and coordinate testimony and confidence. Government is afforded extraordinary time to research and target others similarly situated to bolster its case. Government has learned Lt. Choi's trial defense strategy from the appellate and mandamus briefs, and assembled a highly qualified team of litigants including the chief of their appellate division.[8]

To date, Lt. Choi has spent over $44,000.00 of his personal funds to defend himself in a never ending litigation. He has terminated his former counsel and proceeds pro se at trial resumption. His desire to re-enlist in the military, a personal and historic milestone following the repeal of 10 U.S.C. § 654 "Don't Ask Don't Tell" (the reason for

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[7] Government notes that harm caused it by Judge Facciola was speculative: "there remained [before trial was suspended] the possibility that Choi himself would move for dismissal on selective- or vindictive-prosecution grounds[.]" Opp. at 30.

[8] Hon. Roy W. McLeese III, AUSA, has been nominated to serve as a judge on this Court on the same day, hours before his entry of appearance in this case. No less than six eminent government attorneys with superlative training and expertise have entered appearance for respondent, to counter one pro se petitioner.

the exercise of constitutionally protected activity which lead to wrongful arrest), is prevented by the trial alone. Lt. Choi daily contemplates the consequence of 6 months in jail and federal conviction, insulted by the actual vindictive behavior of government counsel deliberately refusing to address him by his earned military title "Lieutenant." Lt. Choi's honorable discharge and record of faithful and honorable service, in combat are public record and appellee was instructed by trial judge to abide by well known protocol and etiquette.

"DE NOVO" OR "CLEARLY ERRONEOUS" REVIEW

Government misleads this Court, attempting to dispute Judge Facciola's factual finding of a prima facie case of selective and vindictive prosecution. (Opp. 15-16, 23-28). Government makes assertions as if (1) appeal were post-judgment and (2) the standard of review on that appeal were ***de novo***.

Even on post-judgment appeal, the government may never challenge a trial judge's factual finding of a prima facie case of selective or vindictive prosecution on the merits. That finding acquiesces into any final judgment for dismissal or acquittal after the trial court has the facts, and after defendant has had full benefit of discovery allowed by the prima facie finding. It is the factual finding of selective or vindictive prosecution on the merits on final judgement (i.e. dismissal) that the Government may then appeal. Moreover, on post-judgment appeal, ***"clearly erroneous"*** is the standard for review of the

factual findings of a trial judge, not ***"de novo."*** See Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985); Awad v. Obama, 609 F.3d 1,7 (D.C. Cir. 2010).[9]

Government overrides the fact-finding discretion of Judge Facciola by trying the facts a second time by Judge Lamberth and a third time by this honorable Court, each time ***de novo***, without the effect of the prima facie factual finding, a finding which Judge Lamberth did not overturn.[10]

Exercising undue ***de novo*** advantage, Government makes factual assertions and enters new evidence not part of the trial record to Judge Lamberth for consideration. For example, Government states "OAG subsequently dismissed the cases (id.), possibly because of concern that standing on the masonry ledge and chaining oneself to the White House fence does not violate the traffic regulations" (Opp. at 26). No evidence of this assertion was adduced at trial. Further: "By the time Choi engaged in the same conduct in November 2010, the Park Police had done some additional research and determined that Choi's anticipated conduct (and that of the rest of the demonstrators) could violate 36

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[9] "We review a district court's factual findings for clear error, regardless of whether the factual findings were based on live testimony or...documentary evidence." See also Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1294 (D.C. Cir. 2010) ("This standard applies to the inferences drawn from findings of fact as well as to the findings themselves.") (internal quotation marks an citation omitted); Boca Investerings Partnership v. United States, 14 F.3d 625, 629-630 (D.C. Cir. 2003) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."); Overby, 595 F.3d at 1294 ("if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it...Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

[10] Judge Lamberth's mandamus was solely granted on the basis of an alleged procedural error, not the prima facie finding itself.

C.F.R. 2.32(a)(2)[.]" No evidence of this anticipation and research was adduced at trial. Moreover, the assertion of "Choi's conduct" is contradicted by by trial evidence.[11] For another example, Government states that

> Because the Officer [Us.S. Park Police Officer Jerome Stoudamire] was testifying in federal court, presumably he meant that it was the first time he testified in federal court as opposed to Superior Court... Officer Stoudamire did not claim to have information about arrests or prosecutions in which he did not participate (Opp. at 15 fn 11).

No evidence of these assertions favoring the Government were adduced at trial. Moreover, the Government presumption "presumably he meant that..." *ipso facto* violates the ***"clearly erroneous"*** standard, because any "presumption would be for the trial judge to make." Judge Facciola made it against the government.

In yet another example, Government introduces United States v. Sheehan to refute mischaracterized claims about selective prosecution. "Sheehan alone refutes Choi's claim" (Opp. at 15). Trial adduced testimony about similarly situated individuals affixing themselves to the fence in December 2010 charged municipally. Government mischaracterization of the facts radically alters the record for the Court. Government omits evidence too extensive to state here; Lt. Choi refers the Court to his petition and and Opposition to Government Petition for Mandamus.

Lt. Choi was wrongfully arrested in March and April 2010, municipal cases which ended in a complete dismissal. This motivated government officials to engage in illegal

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[11] Choi's conduct was different in November 2010 than the two previous wrongful arrests. In November his speech was critical of President Obama personally.

surveillance, vindictive overcharging and excessive force in November 2010. Lt. Choi's public image and rhetoric increased significantly in critique of the Obama administration by then. Government selected to prosecute federally because the demand of the demonstrators in November 2010 was damaging to political election campaigns. All 13 peaceful protestors were offered a wired plea deal, and all plead guilty except Lt. Choi. At the May 11, 2011 plea deal status conference, a spokesperson for the group declared coercion to plead guilty.

> DEFENDANT BEN-SHALOM: I'm being asked to plead guilty to a crime. I am doing so because I have an obligation to 12 other people here today...Today I feel like I'm being treated as a piece of human effluvia, and I'm being forced to really deal with my conscience and plead guilty to something that's a crime even though I don't think I'm a criminal... COURT: I cannot accept Ms. Ben-Shalom's plea of guilty if in fact it was not a voluntary plea... DEFENDANT BEN-SHALOM: I think there's a lot of bullying going on here. (Tr. 5/11/2011 at 78).

Notably, two arrestees moved to withdraw their guilty pleas because they disagreed with facts and coerced statements drafted by the government. (Dkt. #66). Upon trial resumption, co-arrestees will testify to their philosophical reasons for pleading guilty, disagreement with Government produced statement of facts (Dkt. #44) and coercion by AUSA George and the other co-arrestees to plead guilty, as well as the actual vindictiveness of Ms. George and other prosecutors in and near the courtroom. Notably, Government did not refute or object to the merits of the claim raised by Ssgt. Ben-Shalom and Sgt. Finkenbinder in their motion to withdraw guilty pleas. (Dkt. #102 at 12).

Government claims Lt. Choi "raised a safety concern" without articulating any specific concern. Lt Choi states the safety concerns caused by thousands of pro-Obama revelers at a May 2011 White House assembly celebrating the death of Osama bin Laden. Trial evidence clearly showed a prima facie case that the Government selectively and vindictively prosecuted Lt. Choi.

GOVERNMENT RAISED SELECTIVE PROSECUTION

Government asked questions pertaining to selective prosecution at trial. They only took the drastic step of seeking mandamus when trial judge found prima facie. This amounted to "sandbagging." A litigant cannot benefit from this own "'sandbagging' the court -- remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." Puckett v. United States, 129 S.Ct. 1423, 1428 (2009) (internal quotation marks omitted). "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited...by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" United States v. Olano, 507 U.S. 725, 731 (1993).

After hearing the belated complaint that double jeopardy attached and selective prosecution claims should not be heard in trial, Judge Facciola said the situation was of the Government's own making. Indeed, even if Lt. Choi filed a written pretrial motion regarding selective or vindictive prosecution, that would not have prevented Judge Facciola's mid-trial decision and attachment of double jeopardy thereto. Judge Facciola simply would have ruled on such a written motion in the same way he addressed the

August 25, 2011 oral motion raising the selective prosecution defense, and Government's oral objection and motion in limine: defer to trial, which he did, correctly exercising his discretion.[12]

PROSECUTOR NEGLIGENCE

AUSA Angela George did not seek timely review of Judge Facciola's August 25, 2011 decision to entertain the selective prosecution defense at trial. She hastily delivered *Jencks* material only 40 hours before trial commenced, although she had material well before then. She filed her motion in limine 10 hours before trial commenced. The filing never reached Lt. Choi until AUSA George raised it at trial. Timing alone deems their motion insufficient. Judge Lamberth ignored the Government's negligence.

APPEAL CAPACITY AND PROSPECTIVE JURISDICTION

Even Judge Lamberth made clear: he has no appeal capacity to issue mandamus for the government. Jurisdiction can not be assembled piecemeal: jurisdiction is strictly construed. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941). If the Government can not appeal to Judge Lamberth, it can not get mandamus from him either.

Government asserts for the first time, the "prospective jurisdiction" doctrine (In re Tennant). But as In re Tennant makes clear, "prospective jurisdiction" only applies when

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[12] Government places blame for its own failure on Lt. Choi stating: "the trial ...was derailed by defense counsel's questioning on issues related to selective and vindictive prosecution[.]" First, trial was not "derailed.Government finished it cases and rested. Lt. Choi's case was derailed. Second, Lt. Choi's questioning was proper at the time, because Judge Facciola correctly allowed it. Third, the Government itself engaged in selective prosecution questioning. JUDGE FACCIOLA: But I'm not sure why I have to see this again. MS. GEORGE: Because I need to ask Captain Beck...whether he told any of the officers to consider the sexual orientation of the defendants at this point in time" (Tr. 8/31/11 AM at 58-64; 8/31/11 AM at 70).

1) there is or would be appellate jurisdiction to begin with, and 2) the illegal act alone prevents the harmed party from perfecting an appeal. In the instant case, Government had no appeal to begin with, as Judge Facciola has not rendered a final judgment yet.[13] Moreover, Judge Facciola's prima facie finding did not prevent Government from perfecting a putative appeal to this Court on August 25, 2011, when Judge Facciola first decided to the set timeline for selective prosecution claims.

APPELLATE MANDAMUS AUTHORITY CITED

Government falsely claims that Lt. Choi "cites no authority, however, that precludes the district court...from granting mandamus to a magistrate judge in a criminal case." In fact, Lt. Choi did extensively cite authorities in his petition, including this Court's decision In re Cheney, precluding such mandamus. Moreover, the burden was not on Lt. Choi to disprove jurisdiction for Judge Lamberth; Government had to prove jurisdiction for Judge Lamberth's mandamus, by demonstrating an explicit congressional grant of jurisdiction to District Court judges to issue mandamus in non-original action. See United States v. Morgan, 346 U.S. 502, 506 (1954) (power of a federal court to grant a writ must be specifically authorized by Congress); Kokkonen v. Guardian Life Ins. Co.

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[13] See In re Tennant, 359 F.3d at 529: "It is one thing to say that we have such authority when, in the formulation used by the Supreme Court, a case is 'within [our] appellate jurisdiction although no appeal has been perfected.' Dean Foods, 384 U.S. at 603-04 (quoting Roche, 319 U.S. at 25); see also McClellan, 217 U.S. at 280 (case "within the appellate jurisdiction of the higher court"). It is quite another to claim such power solely on the basis that events might lead to filing before an agency or lower court, which might lead to an appeal to this court. *** To dispense with even that preliminary requirement would effectively grant us jurisdiction to consider extraordinary writs in any case, because it is easy enough to spin out "for want of a nail" scenarios from any set of facts that could eventually lead to this court."

of America, 511 U.S. 375, 377 (1994) (limited jurisdiction of federal courts is not to be expanded by judicial decree."). Government failed to do so. This Court's decision In re Cheney prohibits them.

NO MANDAMUS PRECEDENT FOR GOVERNMENT

Lacking precedent for non-original action mandamus for prosecution in criminal cases, Government asserts "practice in this jurisdiction and others" but their assertion is wrong, and misrepresentative of the holding and import of its three cases cited. Judge Lamberth himself admitted in his memorandum opinion granting mandamus: "[n]one of these [three Government] cases squarely addresses the issue at hand" because in each case the Court of Appeals "expressly did not determine whether it is proper to file a petition for writ of mandamus with the district court." Pet. Ex. A at 9-10. Indeed, even with regard to Ecker, an argument not made below in the District Court in the first instance will not be considered on appeal by the Court of Appeals.

Government relies on Local Criminal Rule 57.14(7) to find jurisdiction for the illegal mandamus. The rule only applies to criminal cases not already assigned for trial, Lt. Choi's criminal case was already assigned to Judge Facciola, who was already trying it under 18 U.S.C. 3401, thus giving Judge Facciola exclusive jurisdiction to hear the trail to judgment without intervention by another judge, to include the Chief Judge. Further, local rules do not substitute for actual congressional grants of mandamus jurisdiction, or caselaw, which clearly prohibit such illegal mandamus.

PETITION TO VACATE ENTIRE MANDAMUS

Judge Facciola never said selective prosecution was a defense on the merits. Government misleads this Court by claiming he "indicated that he would allow the defense to pursue the claim as a defense on the merits." Despite repeated attempts at trial to trap him into saying so (Tr. 8/31/11 AM at 65 and 8/31/11 PM at 10-11), Judge Facciola never said that selective prosecution is a defense on the merits, or that he would allow Lt. Choi to pursue it as such. Judge Facciola merely ruled that he would allow the pursuit of the claim.

Likewise, Government falsely argues Lt. Choi

> does not content that the district court [Judge Lamberth] erred in holding that a selective or vindictive prosecution claim is not a defense on the merits, nor does he argue that the portion of the writ directing the magistrate court not to consider it as a defense on the merits is erroneous or requires correction.

In fact, Lt. Choi did and still does contend that Judge Lamberth erred, and requires correction by this Court, because Judge Lamberth had no jurisdiction in the first place to issue any specific holding of the writ of mandamus he issued. See, e.d., Lt. Choi Petition, passim. For this reason, Lt. Choi petitioned this Court to order Judge Lamberth to vacate his entire mandamus memorandum and order, not simply parts of them. See id. at 1.

GOVERNMENT OMISSIONS AND MISREPRESENTATIONS

Government misleads this Court, claiming Judge Facciola "gave the government 10 days within which to file a petition for writ of mandamus," but what the Government omits is that Judge Facciola gave them 10 days to file a petition with this Court. not with

Judge Lamberth. "JUDGE FACCIOLA: I will as a courtesy to the Court of Appeals continue this matter for 10 days within which for you seek your writ of mandamus" Tr. 8/31/11 PM at 24.

Government misleads this Court, stating Lt. Choi "asserts two reasons why he has no adequate means of relief besides mandamus." Actually, Lt. Choi asserted far more than two reasons in the Petition.

Government mentions (Opp. at 13) Lt. Choi's argument that if Judge Lamberth's error were not corrected until post-judgment appeal, any resumed trial before Judge Facciola would to some degree at least render the prior trial a waste of money for all involved, including the Government. Clearly, with six highly trained attorneys employed to counter one pro se defendant, the government wastes money every day it refuses to move for dismissal, with every radical maneuver and delay tactic it applies.

Government asserts that the criminal justice system should subordinate itself to the (heretofore theoretical) budgetary preferences of one US Attorney's Office, who offers no actual accounting, but claims they "could have assessed the claims, determined the extent of resources...whether the expenditure of the government's scare resources was warranted in order to continue the prosecution." However, the Government did know before trial, that Judge Facciola would entertain the defense of selective prosecution, but the US Attorney's Office did not drop charges. No doubt frustrated at the assertion of constitutional rights of the accused to stand trial, prosecutors vindictively dragged out trial, withheld evidence and petitioned for illegal mandamus. The validity of budgetary

claims is now expired, as over 100 days have passed since the prima facie finding, and the Government has had sufficient time to determine the financial worth of vindictively and relentlessly pursuing Lt. Choi.

Government misleads this Court, incorrectly stating as it did to Judge Lamberth, that the November 15, 2010 protest was the "third time in nine months that Choi had handcuffed himself to the White House Fence during a DADT protest and failed to obey an order to leave the area" suggesting prior offenses by Lt. Choi. In fact, for the previous two wrongful arrests, Park police orders were in error. Orders to get off the sidewalk were read but Lt. Choi was standing on the masonry base, legally not the sidewalk. Because of this legal conundrum, Government dropped the "failure to obey" municipal charges.

Government misleads this Court, incorrectly stating as it did to Judge Lamberth, stating (Opp. at 1) that Lt. Choi "refused to leave the area despite three orders." As US Park Police Lt. LaChance testified, Lt. Choi was ordered off the sidewalk, a sidewalk on which Lt. Choi did not stand. AUSA Angela George declared to Judge Facciola, "Well, 36 [C.F.R.] 7.96 Your Honor, specifically defines the White House sidewalk, and it does not include the ledge and/or what people refer to as the masonry base." (Tr. 8/29/2011 AM at 109). From Tr. 8/29/2011 PM at 51-53:

> MR FELDMAN: When you told him through the bullhorn, 'Get off the sidewalk,' was he on the sidewalk?
>
> LT. LACHANCE: He was on the ledge.
>
> MR FELDMAN: But you told him to get off the sidewalk when he's on the ledge, correct?

LT LACHANCE: Yes Sir.

MR FELDMAN: How can you get off the sidewalk when you're not on the sidewalk?

LT LACHANCE: Point taken.

Respectfully Submitted,

/s/

DANIEL CHOI
Pro Se
271 W. 47th St. #40D
New York, NY 10036-1455
(714) 654-0828
contact@ltdanchoi.com

PROOF OF SERVICE

Under penalty of perjury under the laws of the United States of America, I hereby declare that on January 3, 2011, via ECF and email, I served a copy of the foregoing Reply upon AUSA Stratton C. Strand, 555 Fourth St., N.W., Rm. 8104, Washington, D.C. 20530.

/s/
DANIEL CHOI

CERTIFICATE AS TO PARTIES AND AMICI, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules, I hereby certify the following:

Parties and Amici
The parties below and on petition are defendant/petitioner, Daniel Choi, and respondent, the United States of America. There were no amici below.

Rulings Under Review
Lt. Choi petitions from Chief Judge Royce C. Lamberth"s October 11, 2011 memorandum opinion and order in Case No. 10-739-11, granting mandamus to the Government.

Related Cases
Appeal No. 11-3094.

/s/
DANIEL CHOI

TAB A: POSSIBLE UNIVERSE OF SIMILARLY SITUATED

Those handcuffed or affixed to the White House Fence:

DATE	DEFENDANT	CAUSE	Charges: Federal or Municipal	Affixed
02/28/2005	Multiple Persons in Wheelchairs	ADAPT	Municipal	1xHand
04/10/2009	Paul Magno	GITMO Torture	Municipal	2xHand
04/18/2009	1 Person in Orange Prison Garb	GITMO Torture	Municipal	2xHand
03/18/2010	Daniel Choi	DADT	Municipal	2xHand
	James Pietrangelo		Municipal	
4/20/2010	Daniel Choi	DADT	Municipal	2xHand
	Mara Boyd		Municipal	
	Larry Whitt		Municipal	
	James Pietrangelo II		Municipal	
	Autumn Sandeen		Municipal	
	Evelyn Thomas		Municipal	
04/27/2010	91 Persons in Wheelchairs	ADAPT	Municipal	1xHand
05/07/2010	Iana DiBona	DADT	Municipal	2xHand
	Alan Bounville		Municipal	
	Anne Tischer		Municipal	
	Mark Reed		Municipal	
	Natasha Dillon		Municipal	
	Nora Camp		Municipal	
06/07/2010	Q'orianka Kilcher	Oil	Municipal	Waist
	Saskia Kilcher		Municipal	n/a
11/15/2010	**Daniel Choi**	**DADT**	***FEDERAL***	**1xHand**
	Evelyn Thomas		***FEDERAL***	
	Mara Boyd		***FEDERAL***	
	Autumn Sandeen		***FEDERAL***	
	Miriam Ben-Shalom (Withdrew Guilty Plea)		***FEDERAL***	
	Ian Finkenbinder (Withdrew Guilty Plea)		***FEDERAL***	
	Daniel Fotou		***FEDERAL***	
	Michael Bedwell		***FEDERAL***	
	Raphael Farrow		***FEDERAL***	
	Justin Elzie		***FEDERAL***	
	Robert Smith III		***FEDERAL***	
	Scott Wooledge		***FEDERAL***	
	Robin McGehee		***FEDERAL***	
12/16/2010	Eliott Adams	Anti-War	Municipal	Neck
	2 Persons		Municipal	Hand
	128 Persons		Municipal	n/a
01/31/2011	Jonathan Gold	9/11 Truth	Municipal	2xHand